THE BALLER HERBST LAW GROUP

A PROFESSIONAL CORPORATION
1820 JEFFERSON PLACE, N.W.
SUITE 200
WASHINGTON, D.C. 20036
(202) 833-5300
FAX: (202) 833-1180

EX PARTE OR LATE FILED

WRITERS DIRECT DIAL:
(202)833-1144

INTERNET ADDRESS:
JimB@Baller.com

February 10, 1999

Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
The Portals
445 Twelfth Street
Eighth Floor
Washington, D.C., 20554

re: Notice of *Ex parte* Communications in Petition for Preemption of Section 392.410(7) of the Revised Statutes of Missouri, *CCPol Docket No. 98-122*

Dear Secretary Salas:

On February 9, 1999, Andrew Dalton and Kenneth McClure of City Utilities of Springfield, Missouri; Jane Cirrincione and Richard Geltman of the American Public Power Association (APPA); and James Baller, counsel to the Missouri Municipals and APPA in the Missouri preemption proceeding, participated in an *ex parte* meeting with Lawrence Strickling, Chief, Robert Atkinson, Deputy Chief, and Jordan Goldstein and Valerie Yates of the Common Carrier Bureau. The meeting occurred in Mr. Strickling's office and lasted approximately 45 minutes.

During the meeting, representatives of the Missouri Municipals and APPA made the following points:

- Public power utilities have for decades played a critical role in bringing competition to their communities in the electric power industry and can play a similar role in telecommunications. The cartoon appended hereto as Attachment A reflects what public power utilities can do in the absence of state barriers to entry.

- The need of public power utilities to be able to provide telecommunications services free of barriers to entry affects not only the telecommunications industry but also the electric power industry. There, Congress and the states are striving to maintain a competitive balance between the public and private sectors. As privately-owned electric utilities move into telecommunications, state barriers that inhibit the ability of

public power utilities to offer similar services could decisively tip this competitive balance in favor of the private sector, contrary to Congress's intent.

- Both the Commission in the *Texas Order* and the D.C. Circuit Court of Appeals in the *Abilene* case expressly declined to rule on whether the term "any entity" in Section 253 of the Telecommunications Act applies to public power utilities. The Missouri preemption proceeding squarely presents and emphasizes this issue.

- In its brief in the *Abilene* case (distributed at the meeting and appended hereto as Attachment B), the Commission acknowledged that it had not considered the legislative history of Section 253 in issuing the *Texas Order*, because it believed that this history applied primarily to public power utilities. At oral argument, counsel for the Commission also urged the Court not to consider the rights of public power utilities, promising that they would be addressed fully and fairly in the Missouri preemption proceeding currently before the Commission. In response, the D.C. Circuit did not consider the legislative history, finding that it applies only to public power utilities, whose rights were not before the Court.

- The Missouri Municipals and APPA believe that *Abilene* was incorrectly decided for various reasons, including the Court's failure to consider the petitioners' leading case, *Salinas*, in which the Supreme Court stated that the term "any" should be interpreted broadly when used in an unrestrictive way. The Court also did not have an opportunity to consider the brief that the Commission recently filed with the 11th Circuit in the *Pole Attachment* case, in which the Commission's interpretation of the term "any" was virtually identical to that of the Abilene petitioners. The Abilene petitioners will soon be seeking rehearing of the *Abilene* case, but whether correct or incorrect, *Abilene* is distinguishable from the Missouri case.

- The Supreme Court's recent decision in the *Interconnection* case confirms that Congress did not want traditional notions of state authority to stand in the way of full implementation of the pro-competitive purposes of the Telecommunications Act. The Commission should apply the same principle in the Missouri proceeding.

- When not encumbered by state barriers to entry, public power utilities have done very well in creating local competition and bringing much-needed services to their communities. For example, the City of Hawarden, Iowa, recently began to provide cable television and telephone service over its electric utility's new, state-of-the-art communications facilities. Dozens of communities in Iowa have voted by overwhelming majorities in local elections to establish similar communications utilities. Yet, one day after Hawarden began to provide telephone service, the Iowa Supreme Court shut it down. Relying heavily on the Commission's interpretation of Section 253 of the Telecommunications Act in the *Texas Order*, the Court declined

preemption of an Iowa prohibition on public sector competition with the private sector. Fortunately, the Iowa Supreme Court has recently vacated this decision and granted a petition for rehearing. (NB: APPA offered to provide, and Mr. Strickling invited it to submit, a video prepared by MCI WorldCom depicting the Hawarden story.)

- In many communities such as Wadsworth, Ohio, and Glasgow, Kentucky, public power utilities have not only given consumers of cable television service a meaningful choice for the first time, but they have also roused incumbent providers to lower costs and improve services. These experiences confirm the findings in Commission's annual reports on the cable industry that communities that have head-to-head competition get much lower prices and better service than their neighbors that do not have such competition.

- A prompt decision in the Missouri Municipals' favor is vitally necessary because local competition does not exist in Missouri today and will not arrive any time soon. In a recent *ex parte* letter to the Commission, the Missouri Attorney General claimed, without any supporting evidence, that "rural telecommunications is alive and well in Missouri without municipal involvement." That statement is belied by Southwestern Bell's admission last month in its Section 271 proceeding in Missouri -- which the staff of the Missouri Public Service Commission independently confirmed -- that incumbent local exchange carriers in Missouri currently control at least 98.3 percent of the business and residential access lines (Attachment C hereto distributed). Since these data include the major population centers, they underscore the point that competition is non-existent in Missouri's rural areas. Furthermore, according Southwestern Bell's testimony, facilities-based competitive local exchange carriers are not serving residences *anywhere* in Missouri today, including the major population centers. *Id.*

- When incumbent telecommunications providers promote state barriers to municipal entry knowing full well that they cannot meet the needs of rural communities any time soon, the issue takes on a higher dimension. It is not only unfair and illegal, but immoral, to prevent rural communities from helping themselves to achieve economic development, educational opportunity and quality of life comparable to that of their counterparts in more lucrative telecommunications markets.

- The need for a prompt decision in the Missouri Municipals' favor is also underscored by the Commission's recent Report under Section 706 of the Telecommunications Act concerning the deployment of advanced telecommunications capabilities. In the Report, the Commission assumes that such deployment will occur at a prompt and reasonable pace, in part because public power utilities will participate in the deployment. At the same time, in his accompanying statement, Chairman Kennard

expresses concern that "geometric disparities" between urban and rural communities may arise in the very near future. If such disparities do occur, in part because of state barriers to municipal entry, the rationale of the *Texas Order* and the *Abilene* decision would leave the Commission helpless to do anything about them. Congress cannot possibly have intended this.

- Eight states have already enacted barriers to municipal entry, and we understand that similar measures have been, or soon will be, introduced in at least four additional states. If the new measures become law, it will be much more time-consuming and expensive to undo them than to avoid their enactment at the outset. In numerous states, incumbents have urged legislators to ignore the Commission's *dictum* in the *Texas Order* that other states should not do what Texas has done. Instead, they have focused on the Commission's *holding* that it is powerless to prevent states from enacting measures that further entrench local monopolies. Some incumbents have even gone so far as to claim that the *Texas Order* shows that the Commission believes that the private sector is fully capable of meeting the Nation's needs for telecommunications services. The incumbents will surely redouble their anti-competitive efforts in view of the D.C. Circuit's *Abilene* decision. The Commission cannot deter these anti-competitive efforts with more dictum, but only by issuing a prompt, clear and forceful *decision* that the Missouri law in issue is preempted by the Telecommunications Act.

Sincerely,

James Baller

Enclosures

cc: Attached Lists

CERTIFICATE OF SERVICE

I, James Baller, hereby certify that on this 10th day of February 1999, I caused copies of the foregoing letter to be served on the parties on the attached Service List, by hand delivery, where indicated, and by first-class, U.S. Mail, where indicated.

By Hand Delivery:

Honorable William E. Kennard, Chairman
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Honorable Susan Ness, Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Honorable Harold W. Furchtgott-Roth,
Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Honorable Michael K. Powell, Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Honorable Gloria Tristani, Commissioner
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Thomas Powers
Legal Advisor to Commissioner Kennard
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Anita Walgren
Legal Advisor to Commissioner Ness
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

ITS, Inc.
1231 20th Street, N.W.
Washington, D.C. 20036

Paul Misener
Legal Advisor to
Commissioner Furchtgott-Roth-F.C.C.
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Kyle Dixon
Legal Advisor to Commissioner Powell
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Paul Gallant
Legal Advisor to Commissioner Tristani
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Christopher J. Wright, General Counsel
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Ms. Kathryn Brown, Chief of Staff
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Janice M. Myles
Federal Communications Commission
Common Carrier Bureau, Room 544
1919 M Street, N.W.
Washington, D.C. 20554

By U.S. Mail:

Kecia Boney
R. Dale Dixon, Jr.
Lisa Smith
Jodie Kelly
MCI Telecommunications Corporation
1801 Pennsylvania Avenue
Washington, D.C. 20006

L. Marie Guillory
Jill Canfield
National Telephone Cooperative Association
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

Michael K. Kellogg
Geoffrey M. Klineberg
Paul G. Lane
Durward D. Dupre
Michael J. Zpevak
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington, D.C. 20005

Jeffrey L. Sheldon
UTC, The Telecommunications Association
1140 Connecticut Avenue, N.W.
Suite 1140
Washington, D.C. 20036

Gail L. Polivy
John F. Rapoza
GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, D.C. 20036

Jeremiah W. (Jay) Nixon
Ronald Molteni
Office of the Attorney General
Supreme Court Building
P.O. Box 899
207 W. High Street
Jefferson City, MO 65102

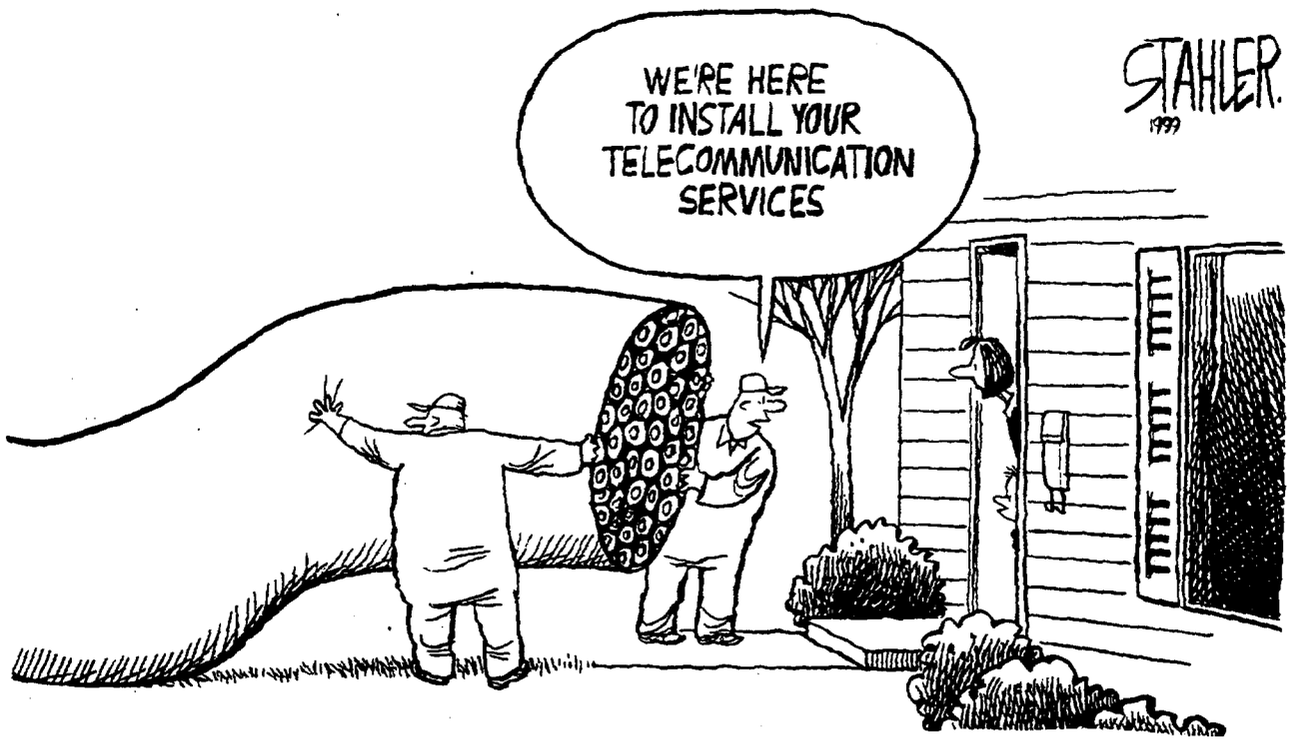
Carol Mattey
Chief, Policy Division
Common Carrier Bureau, Room 544
1919 M Street, N.W.
Washington, D.C. 20554

James Baller
Sean A. Stokes
Lana L. Meller
THE BALLER HERBST LAW GROUP, P.C.
1820 Jefferson Place, N.W.
Suite 200
Washington, D.C. 20036
(202) 833-5300 (phone)
(202)833-1180 (fax)
jimb@baller.com (Internet)

Attorneys for the
Missouri Municipals

February 10, 1999

ATTACHMENT A



By Jeff Stahler (stahler@fuse.net), The Cincinnati Post, for USA TODAY

ATTACHMENT B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 97-1633 & 97-1634

CITY OF ABILENE, TEXAS, *ET AL.*,

PETITIONERS

V.

FEDERAL COMMUNICATIONS COMMISSION
AND
THE UNITED STATES OF AMERICA,

RESPONDENTS

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

JOEL I. KLEIN
ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
ANDREA LIMMER
ATTORNEYS

UNITED STATES DEPARTMENT
OF JUSTICE
WASHINGTON, D. C. 20530

CHRISTOPHER J. WRIGHT
GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

JOHN E. INGLE
DEPUTY ASSOCIATE GENERAL COUNSEL

JAMES M. CARR
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D. C. 20554
(202) 418-1740

made it clear that judges are included." Ashcroft, 501 U.S. at 467 (emphasis in original). The Court proceeded to find that the ADEA was ambiguous on this issue: "[W]e cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not." Id.

Ashcroft requires this Court to apply the same analysis in this case. The Court's task here is not to search for a plain statement that municipalities are excluded from the term "entity" in section 253. Rather, in accordance with Ashcroft, the Court may not read the term "entity" in section 253 to cover municipalities unless Congress has clearly indicated that municipalities are included. As we have demonstrated, Congressional intent on this question is not "plain to anyone reading the Act." Ashcroft, 501 U.S. at 467. Therefore, the Court, like the Commission, should conclude that the term "entity" in section 253(a) does not include municipalities.

B. The Legislative History Of Section 253 Does Not Clearly Indicate That Congress Intended To Preempt The States' Authority To Limit The Activities Of Their Own Municipalities.

Petitioners complain that the Commission misapplied the Ashcroft standard by failing to consider the legislative history of section 253. According to petitioners, "that history makes it crystal clear ... that Congress intended to encourage municipalities" to help provide competition to telecommunications markets, "and that Congress manifested this intent through the definitions and preemption provisions of the Act." Pet. Br. 32. In the administrative proceeding, however, no party argued to the FCC that the legislative history of section 253 supported Abilene's preemption request. To the contrary, in comments filed with the Commission, Abilene urged the agency to ignore the legislative history: "The goal is to ascertain legislative intent through plain language of the statute without looking to legislative history or other extraneous resources." Abilene Reply Comments at 6 (JA) (emphasis

added). Thus, it is understandable why the FCC did not focus on legislative history when it ruled on Abilene's petition. Because no party asked the FCC to consider the legislative history in this context, and because Abilene itself urged the agency not to look at that history, petitioners cannot now claim that the legislative history justifies a remand in this case. See 47 U.S.C. § 405; Freeman Engineering Associates, Inc. v. FCC, 103 F.3d 169, 182-85 (D.C. Cir. 1997); Busse Broadcasting Corp. v. FCC, 87 F.3d 1456, 1460-62 (D.C. Cir. 1996).

Even if petitioners' legislative history argument were properly before this Court, it is baseless. As an initial matter, it is highly questionable whether legislative history should play any role in the application of Ashcroft's plain statement rule. Under that rule, a court must not construe a federal statute to preempt traditional State powers unless Congress has made "its intention to do so unmistakably clear in the language of the statute." Ashcroft, 501 U.S. at 460 (emphasis added) (quoting Will, 491 U.S. at 65). In this context, the Supreme Court has declared that Congressional intent to preempt "must be plain to anyone reading the Act." Ashcroft, 501 U.S. at 467. The Court's opinion in Ashcroft strongly suggests that if Congress does not make its preemption intentions plain in the text of a statute, the legislative history cannot supply the clarity that the statutory language lacks.

In any event, the legislative history cited by petitioners does not clarify whether Congress intended for section 253 to preempt State laws that regulate municipalities. See Pet. Br. 10-17. Most of the legislative materials quoted by petitioners focus on the provision of telecommunications service by utilities.[8] These materials are not pertinent to this case. In the

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[8] See S. Rep. No. 367, 103d Cong., 2d Sess. 55 (1994) (1994 Senate bill, whose provision for removing entry barriers formed the basis for section 253, defined "telecommunications carrier" to include "an electric utility" that "provides telecommunications services"); Conference Report at 127 ("explicit prohibitions on entry by a utility into telecommunications are preempted under" section 253); Letter from Congressman Dan Schaefer to FCC Chairman

Order challenged by petitioners, the Commission expressly declined to decide "whether section 253 bars the State of Texas from prohibiting the provision of telecommunications services by a municipally-owned electric utility." Order ¶ 179 (JA).[9]

Petitioners do not cite a single passage from the legislative history of the 1996 Act that discusses the provision of telecommunications service by municipalities. Instead, they rely principally on a 1994 Senate report on S. 1822, a bill whose provision for removing entry barriers formed the basis for section 253. Petitioners attach great significance to that report's statement that "State or local governments may sell or lease capacity" on their own telecommunications facilities to carriers providing telecommunications service. S. Rep. No. 367, 103d Cong., 2d Sess. 56 (1994). But that statement did not mean that the sponsors of the bill expected municipalities themselves to provide telecommunications service. To the contrary, the Senate report on S. 1822 emphasized that State or local governments that sell or

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Reed Hundt, Aug. 5, 1996 (JA) (section 253 requires the Commission to "reject any state or local action that prohibits entry into the telecommunications business by any utility, regardless of the form of ownership or control"); Letter from Senator J. Robert Kerrey to FCC Chairman Reed Hundt, Sept. 9, 1997 (JA) (by using the term "any entity" in section 253, "Congress intended to give entities of all kinds, including publicly-owned utilities, the opportunity to enter these markets").

[9] There is no basis for petitioners' assertion that the FCC should have given more weight to letters submitted by Representative Schaefer and Senator Kerrey during this proceeding. See Pet. Br. 15-17. Those letters asserted only that the term "entity" in section 253 includes municipally owned utilities; they took no position on whether the term encompasses municipalities themselves. Since the letters did not address the issue raised by Abilene's petition, there was no reason for the Commission to consider those letters when it ruled on that petition. In any event, the letters are merely "post-passage remarks" that "represent only the personal views of" two legislators. Regional Rail Reorganization Cases, 419 U.S. 102, 132 (1974) (internal quotations omitted). Such "post hoc observations by [individual] member[s] of Congress carry little if any weight." Bread Political Action Committee v. FEC, 455 U.S. 577, 582 n.3 (1982) (quoting Quern v. Mandley, 436 U.S. 725, 736 n.10 (1978)).

lease telecommunications capacity are not providing telecommunications service: "[T]he offering of [such] capacity alone is not a 'telecommunications service[].'" Id.

In short, nothing in the legislative history cited by petitioners indicates that Congress even contemplated that municipalities themselves would provide telecommunications service. Obviously, if it is uncertain whether Congress considered this possibility, it is even less clear that Congress intended to preempt State laws that prohibit municipalities from providing telecommunications service.

In sum, neither the language nor the legislative history of section 253 clearly indicates that Congress intended to preempt the States' authority to prohibit their own municipalities from providing telecommunications service. In the absence of any plain statement that Congress authorized such preemption, the Commission properly applied the Ashcroft standard when it denied Abilene's request to preempt PURA95 section 3.251(d).

II. THE COMMISSION'S DENIAL OF ABILENE'S PREEMPTION REQUEST IS NOT INCONSISTENT WITH OTHER FCC DECISIONS.

In addition to asserting that the FCC misapplied the Ashcroft standard, petitioners claim that the Commission's denial of Abilene's petition is inconsistent with other FCC decisions. Pet. Br. 34-38. The second claim has no more merit than the first. The supposedly "inconsistent" decisions that petitioners cite are clearly distinguishable from the Commission's decision to deny Abilene's petition.

For example, the Commission's refusal to preempt PURA95 section 3.251(d) was not inconsistent with its previous preemption of the decisions of two Kansas municipalities to deny telephone franchise applications in Classic Telephone, Inc., 11 FCC Rcd 13082 (1996). The Commission's different resolution of these two cases was justified by the different factual

situation that each case presented. The cities that denied Classic's franchise applications .concluded that the offering of telephone service in their communities by more than one company would be economically infeasible and inefficient. See Classic, 11 FCC Rcd at 13085 (¶ 6), 13089 (¶ 11). In effect, these cities imposed a flat ban on any entry by competing providers of local telephone service. That is precisely the kind of "barrier to entry" that section 253 was designed to preempt.

By contrast, the Texas statute challenged by Abilene "is not an outright ban on entry by competing local service providers." Order ¶ 188 (JA). Although PURA95 section 3.251(d) precludes municipalities and municipally owned utilities from providing telephone service in Texas, privately owned companies remain free to provide such service. The Texas law simply restricts the activities of the State's political subdivisions; it does not rest on any determination that competition in Texas would be economically infeasible and inefficient. The Commission reasonably determined that, the Texas statute notwithstanding, privately owned providers of telephone service could supply sufficient competition to satisfy the objectives of the 1996 Act: "Permitting the state of Texas to restrict participation in telecommunications markets by its municipalities thus does not thwart the Act's pro-competitive purposes to an extent that warrants preemption." Order ¶ 187 (JA).

There also is no conflict between the Commission's denial of Abilene's petition in this case and its decision in IT&E Overseas, Inc., 7 FCC Rcd 4023 (1992). Unlike Abilene's petition, IT&E Overseas did not implicate federal preemption of traditional State powers. Quite the contrary; in that case, Guam was attempting to exercise traditionally federal powers by asserting jurisdiction over interstate and foreign common carrier communications. To ensure that Guam did not usurp the FCC's exclusive authority to regulate those

communications, the Commission construed the term "any corporation" in the Communications Act to include public corporations such as Guam's publicly owned telephone company. IT&E Overseas, 7 FCC Rcd at 4025 (¶¶ 9-12). The Commission explained that this interpretation of the Act meshed with Congress's clearly expressed intent in 47 U.S.C. § 151 "to centralize authority over interstate and foreign communications in one federal agency." 7 FCC Rcd at 4025 (¶ 11) (emphasis in original). In order to carry out its function of regulating interstate and foreign communications in Guam, the Commission had to preempt Guam's attempts to regulate them. By contrast, in ruling on Abilene's petition, the Commission found no clear indication that Congress intended for section 253 to authorize FCC preemption of State laws governing municipalities. Therefore, in accordance with Ashcroft's plain statement rule, the Commission properly declined to construe the ambiguous term "entity" in section 253 to include municipalities.

Petitioners claim that the Order in this case is internally inconsistent because the FCC's denial of Abilene's petition somehow conflicts with other findings that the Commission made in the Order. Pet. Br. 36-37. No party presented that claim to the Commission, so petitioners cannot raise it here. See 47 U.S.C. § 405; Freeman Engineering, 103 F.3d at 182-85. In any event, the claim lacks merit. As petitioners point out, the FCC recognized that section 253 "obligates" the agency to "sweep away" both direct and indirect prohibitions on the provision of telecommunications service by any entity. Order ¶ 22 (JA). But, as we have already explained, the Commission found no clear indication that the term "entity" in section 253 included municipalities. Consequently, the Commission reasonably concluded that section 253 did not require FCC preemption of State laws forbidding municipalities from providing telecommunications services.

Petitioners also assert that because the Order preempted other provisions of PURA95, it likewise should have preempted PURA95 section 3.251(d). They note that the Order preempted certain build-out requirements and a moratorium on the provision of competitive service in specified rural areas. See Order ¶¶ 73-95, 101-108 (JA - , -). Preemption of these provisions, however, did not entail federal encroachment on traditional State authority to limit the activities of municipalities. The preemption requested by Abilene, on the other hand, would have required the Commission to infringe on Texas's authority to regulate its own municipalities. Petitioners complain that "the Commission applied a different standard" for municipalities. Pet. Br. 37. But they acknowledge that "a different standard" -- the Ashcroft standard -- should apply to Abilene's petition because Abilene requested preemption of a State's fundamental authority over its political subdivisions. The Commission correctly applied the Ashcroft standard when it declined to preempt PURA95 section 3.251(d).

Finally, petitioners maintain that the Order's interpretation of the phrase "any entity" in section 253 is inconsistent with subsequent FCC interpretations of the terms "any" and "entity." Pet. Br. 19-22, 37-38. Even if this were true, the Court has held that "the FCC is not bound retroactively by its subsequent decisions and need not explain alleged inconsistencies in the resolution of subsequent cases." Freeman Engineering, 103 F.3d at 179 (quoting CHM Broadcasting Ltd. Partnership v. FCC, 24 F.3d 1453, 1459 (D.C. Cir. 1994)). If there is an inconsistency between the Order and later FCC decisions, "it would appear more appropriate for the parties to these later cases to contest the inconsistency, than for [petitioners] to base [their] claim to inconsistency on subsequent opinions." Amor Family Broadcasting Group v. FCC, 918 F.2d 960, 962 (D.C. Cir. 1990). After all, "the Commission [can] hardly be faulted for ignoring 'precedents' that did not precede." Capital Network

System, Inc. v. FCC, 3 F.3d 1526, 1530 (D.C. Cir. 1993) (quoting Northampton Media Associates v. FCC, 941 F.2d 1214, 1217 (D.C. Cir. 1991)).

In any event, none of the subsequent FCC statements cited by petitioners address the fundamental issue in this case: whether Congress clearly intended for the term "entity" in section 253 to include municipalities. For that reason, petitioners cannot plausibly claim that the Commission's more recent statements are inconsistent with the Order.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review and affirm the Commission's denial of Abilene's petition for declaratory ruling.

Respectfully submitted,

Joel I. Klein
Assistant Attorney General

Catherine G. O'Sullivan
Andrea Limmer

United States Department
of Justice
Washington, D. C. 20530

Christopher J. Wright
General Counsel

Daniel M. Armstrong
Associate General Counsel

John E. Ingle
Deputy Associate General Counsel

James M. Carr
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418-1740

July 15, 1998

ATTACHMENT C

Exhibit No.:
Witness: Voight
Type of Exhibit: Rebuttal Testimony
Sponsoring Party: MOPSC Staff
Case No.: TO-99-227

MISSOURI PUBLIC SERVICE COMMISSION

UTILITY OPERATIONS DIVISION

SOUTHWESTERN BELL TELEPHONE COMPANY

CASE NO. TO-99-227

REBUTTAL TESTIMONY

OF

WILLIAM L. VOIGHT

Jefferson City, Missouri

January, 1999

NP

Q. Would you please summarize your testimony?

A. Yes. Some types of local competition have been in existence in Missouri for many years, although the local competition envisioned in SWBT's Section 271 application contemplates switched local exchange service competition heretofore unavailable. Staff's data shows that as of January 6, 1999, 27 competitive local exchange carriers were fully authorized, and indeed, holding themselves out to provide local exchange service as competitors in SWBT's Missouri service area. The competitors collectively provide 55,409 business and residential access lines in SWBT's Missouri service area. The data provided to the Staff indicates 20,211 resold residential lines; 22,665 resold business lines; 12,533 facilities-based business lines; and 0 facilities-based residential lines. Staff's data shows five (5) facilities-based providers, however the number of facilities-based providers and the number of access lines being served by facilities-based providers is believed by Staff to be understated largely due to incomplete reporting by the Worldcom family of companies, as well as the possible understatement of "T-1" access lines. Additionally, Staff's data regarding facilities-based residential end-users is believed to be inaccurate as established by SWBT's E-911 database. Because specific competitive market data is so important, Staff recommends that competitors provide to the Telecommunications Department Manager monthly updates of access line counts.

As shown in the Commission approved tariffs of facilities-based providers, facilities-based services being offered in Missouri appear to be exclusively directed to business subscribers. Additionally, resellers in Missouri are in some cases using resold SWBT services to offer unique package and bundled services which SWBT is prohibited from offering. At least one reseller (Sprint) is using SWBT resold services as a prelude to future facilities-based offerings.

Missouri Public Service Commission

POST OFFICE BOX 360
JEFFERSON CITY, MISSOURI 65102
573-751-3234
573-751-1847 (Fax Number)
http://www.ecodev.state.mo.us/psc/

TO: Brian Long, Governor's Office

FROM: Sherri Murphy, Telecommunications Staff, Public Service Commission

RE: Competition Local Exchange Report

DATE: January 22, 1999

Attached you will find our monthly report on the status of telecommunications companies seeking to provide basic local exchange service in Missouri. The list shows that as of January 22, 1999, 91 applications have been filed and of those 74 have been granted certificates. The list shows that 113 interconnection agreements have been filed with the Commission of which 91 have been approved. The number of certificates and approved interconnection agreements will not correspond since cellular companies are unregulated but must have their interconnection agreements approved.

There are thirty-one (31) companies which have completed the three-step process and are authorized to provide basic local service in competition with the incumbent local exchange company. These companies and the territories they propose to serve are listed below. In addition, the Commission has one arbitration case pending.

As of January 22, 1999, there are 56,092 access lines served by competitive local exchange companies. That number represents 1.7% of the total number of access lines in the state of Missouri.

Schedule 5